COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 226

DONALD B. JONES,

Petitioner,

v.

GRAVERAET YOUNG KAUFMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Donald B. Jones, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on February 3, 1960.

Opinions Below

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (R 594-636) is reported at 170 F. Supp. 112.[1] The opinion of the Court of Appeals (*infra*, Appendix A. pp. 17-31) is reported at 275 F. 2d 755.

1. Inasmuch as nine additional copies of the record as printed for the use of the court of appeals have been filed pursuant to Rule 21(4), the opinion of the district court is not appended to this petition. Rule 23(1)(i).

Jurisdiction

The judgment of the Court of Appeals was entered on February 3, 1960 (*infra*, Appendix B, pp. 32-33). A petition for rehearing was denied on April 11, 1960 (*infra*, Appendix C, p. 34). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. § 1254 (1).

Questions Presented

I. Will this Court exercise its power of supervision in a case in which a court of appeals has sanctioned the action of a district court which terminated litigation on a motion for summary judgment by imposing a compromise upon the parties, without their consent, in order to avoid a trial of substantial questions concerning material facts admitted by the district court and the parties to be actually and in good faith controverted?

II. Would the New York Court of Appeals hold, as did the court of appeals herein, that a transaction which appears on its face to be a sale of an interest in property, measured in dollars, and which in fact had been intended by the parties to be a sale, must be converted by operation of law into a loan if the purchaser does not run any substantial risk of receiving back the amount actually paid to the seller?

If the New York court would convert such a sale into a loan, would it have upheld the validity of the assignments involved in this case on other grounds?

Statutes Involved

The statutes involved are set out in Appendix D, (*infra*, p. 35).

Statement of the Case

Jurisdiction of the district court in this case is based upon diversity of citizenship. In 1943 a will construction action concerning the will of Otto Young, deceased, was commenced in the United States District Court for the Northern District of Illinois. That court assumed jurisdiction on the basis of diversity of citizenship and thereafter retained jurisdiction of the administration and liquidation of this substantial trust estate. Jurisdiction of the court for purposes of the present action was upheld on appeal. *De Koruin* v. *First National Bank of Chicago*, 267 F. 2d 337, rhg. den., cert. den. 361 U. S. 931, sub nom. *Berson* v. *Kaufman*.

By the terms of the will, the trust was to terminate at the death of the testator's last surviving daughter, upon which occurrence the corpus was to be distributed equally among the testator's grandchildren then living, with issue of deceased grandchildren representing their parent *per stirpes*. In the will construction action the future interests of the grandchildren were classified as being vested subject to divestment in the event of death prior to termination of the trust.

Following the decision in the will construction action, respondent, Graveraet Kaufman, one of testator's 18 grandchildren, made various assignments in New York which purported to sell portions of his remainder interest. These assignments were made notwithstanding a spendthrift clause contained in the will.

The testator's last surviving child was respondent's mother, Mrs. Pratt, who was born September 8, 1877 and died August 17, 1956. Shortly after her death, the First National Bank of Chicago, as Trustee of the estate of Otto Young, petitioned the district court for instructions, stating that it had notice of numerous assignments and

sub-assignments, and requesting a determination as to whom Kaufman's share of the trust corpus should be paid. In his answer to this petition, Kaufman alleged that the remainder interest was not assignable because of the spendthrift clause in the will, and that the assignments were void because in violation of the usury statute of New York.

On October 14, 1957, Henry N. Rapaport, a subassignee of portions of five original assignments made by Kaufman to Philip S. Rosen, filed a motion for summary judgment directing the trustee to pay him the face amount of his sub-assignments. Petitioner did not join in that motion. In answer thereto, Kaufman again alleged that the assignments were ineffective because of the spendthrift clause and because they violated the New York usury statute. In addition, he filed a counter-motion for summary judgment asking that all five of these original assignments, as well as all sub-assignments made thereunder, be declared void as a matter of law. Petitioner, being a subsequent purchaser of a portion of one of these five assignments, was thereby forced to file objections, supported by affidavits, to the counter-motion for summary judgment (R. 534).

Kaufman, who was born in 1900, was a man experienced in matters of finance and loans, having been in the banking business in New York City since 1921. Prior to making his first assignment he attempted to borrow on his remainder interest by offering it as security, but was unable to arrange such loans. Thereafter he negotiated with Rosen for the sale of a part of his remainder interest.

Kaufman made many assignments ranging over a period from September 1950 to a date just prior to his mother's death in August, 1956, but the five assignments spotlighted by Kaufman's counter-motion were made between April 1951 and April 1952. In these assignments

Kaufman purported to sell and assign to Rosen all of his right, title, and interest to the corpus of the trust to the extent of a total of $321,500, for which he received about 24% of that amount. The assignments contained an express disclaimer of any personal obligation on the part of the assignor other than to retain as a trust fund for the benefit of the assignee any of the property assigned which might come into the hands of the assignor. At the time of these various purchases, Rosen took out insurance on Kaufman's life in the total amount of $159,000. All premiums on this insurance were paid by Rosen. Thereafter Rosen, with the knowledge and assent of Kaufman, sold the interests which he had thus acquired to various sub-assignees, of whom petitioner is one.

After a hearing on the motions for summary judgment, the district court held that the spendthrift clause of the will applied to the assignments made by Kaufman, with the result that the owners thereof had no claim against the estate, and that under New York law the assignments could not be sales but must be treated as loans. The court then sidestepped the question of whether they were usurious loans by holding that the assignments were given as collateral security for the amounts paid to Kaufman plus legal interest.

An order was entered on November 12, 1958 denying Rapaport's motion for summary judgment and allowing Kaufman's counter-motion except as to a sum equivalent to the amount actually paid to him by Rosen plus interest at 6% plus proper out-of-pocket expenses. The sub-assignees affected by this order appealed therefrom. The court of appeals held that the spendthrift clause in the will did not apply to corpus assignments and reversed the lower court in that respect, but it held that under New York law the district court was justified in fashioning the equitable remedy announced in the decision and order appealed from. A petition for a rehearing was denied.

The First National Bank of Chicago, trustee under the will of Otto Young, is not named as a party to this petition because an order was recently entered in the district court authorizing the trustee to pay into court a sum sufficient to cover the face amount of petitioner's sub-assignment.

Reasons For Allowance of the Writ

I.

The Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court as to call for an exercise of this Court's power of supervision.

Petitioner has been denied a trial of genuine and material issues of fact admittedly raised by respondent's motion for summary judgment. This radical departure from the accepted and usual course of judicial proceedings was brought about as follows:

On respondent's motion for summary judgment, the district court was called upon to determine whether there was any genuine and material factual issue to be tried, and an examination of the moving papers shows that the following issues, *inter alia*, were raised:

(1) Were the assignments sales or loans?

(2) If the assignments were loans, do the facts show that the amount of interest to be paid would exceed the amount permitted by the applicable usury statute?

In its opinion and order granting respondent's motion for summary judgment, the district court concluded that under New York law the assignments were loans even though they had been intended by the parties to be sales and had been drawn up in the form of sales, and therefore held that there was no question of fact to be considered on the first issue.

With respect to the second issue, the court considered the affidavit of an actuary submitted by respondent to establish the duration of the loan, which was to terminate on the death of the income beneficiary of the trust, and to establish whether the loan would, in fact, ever become payable, an event which was to occur only if the respondent outlived the income beneficiary. The affidavit of respondent's actuary treated this last mentioned factor in terms of the value of the interest assigned by the respondent, that value being determined from the actuarial expectancies of persons of the same ages as the income beneficiary and remainderman in this case. Petitioner relied upon affidavits of another actuary and of an expert in the purchase and sale of remainder interests. After reviewing these affidavits, the court said:

> "the court concludes it should not grant the summary judgment sought by Graveraet to defeat the entire claim asserted against him; there is an element of doubt concerning the life expectancy of Mrs. Pratt and the value of the interests assigned by Graveraet" (R. 628).

The court then stated that a determination of the usury question would require a trial of these issues, and throughout the balance of its opinion reasserted the existence of these factual questions. Thus, it said: (Emphasis added.)

> "And, virtually all considerations which have in a long line of cases, led the New York courts to strike down similar transactions as usurious appear to be decisive here, *subject only to proof of a life expectancy and a valuation of shares assigned. Such evidence, if and when adduced,* would not lead inevitably to a conclusion that the transactions are void under the New York usury statute" (R. 630 and 631).
>
> "The uncontroverted facts here justify the conclusion that this is a case where the parties may have sought to abide by the law but the necessary effect

> of the bargain, * * * *if Graveraet's claim of value be upheld on trial*, was to disobey the provisions of the statute, * * * " (R. 633).
>
> "* * * furthermore, *as to the defense of usury*, certain essential facts might be controverted, and *at least a limited trial would have to be conducted*" (R. 634).

Even respondent conceded the existence of genuine and material factual issues to be tried. Thus, in his brief, he stated:

> "Consequently, it is the view of Kaufman that the Court, in proceeding in accordance with Rule 56(d) of the Federal Rules of Civil Procedure, is in a position now to determine certain material facts as existing without substantial controversy. Other facts, however, are actually and in good faith controverted by the parties. As a result, although some of the legal issues presented can be determined without the taking of evidence, all of them cannot be" (R. 555).

In view of its clear statements respecting the existence of material facts at issue, the usual course of judicial proceedings should have compelled the court to deny the motion for summary judgment and to have set the matter down for a trial of these issues. To avoid such a trial, however, the court imposed a compromise in the form of what it conceived to be an equitable solution. It said:

> "To avoid any application of the usury statute, however, the court is of the opinion that the several assignments may be treated as advances or loans to be repaid at such time as Graveraet's share is distributed to him, together with interest at the legal rate. Since the instruments themselves contain no specification of interest, the law will imply that the obligations carry interest at the six percent rate permitted by New York Statute" (R. 633).

In its endeavor to terminate the litigation, the court overlooked the considerations which make a summary judgment an inappropriate means to that desirable end. *Sartor* v. *Arkansas Natural Gas Corporation* 321 U. S. 620, 627 (1944). Indeed, the imposition of such a remedy required factual determinations which had not been made or even considered by court or counsel. In the cases upon which the court relied as authority for its compromise, either there had been a specific finding from the facts proved at a trial that the parties actually had intended the assignments to be given as security for the repayment of the sums advanced plus legal interest, or, although usury could have been found from the facts proved at the trial, the court had avoided such a finding because it had found that the parties had not intended to evade the usury statute.

In the present case, however, there was no evidence whatever before the court that the parties had intended the assignment to be given as security for the repayment of the sums advanced plus legal interest; and the court admitted that there were insufficient uncontroverted facts upon which it could base a finding of usury (R. 628 and 634). Thus, in the absence of a trial, no basis existed for the remedy imposed by the court.

The district court assumed that it could avoid the issue of usury without giving the parties an opportunity to be heard concerning their guilt or innocence of this unsavory charge and concerning the propriety of substituting its compromise for the trial actually required by the accepted and usual course of judicial proceedings. Petitioner, who believes in good faith that he has a meritorious defense on the facts against respondent's claim of usury, has sought in vain for a trial of the controversial issues (R. 534), and has steadfastly objected to the "remedy" imposed by the court. The district court never attempted to determine actual life expectancies or values, but con-

sidered only those portions of the opinions of two actuaries which were based upon mortality tables. The New York Court of Appeals has rejected such use of mortality tables in determining the issue presented to the district court. Thus, in *Hartley* v. *Eagle Insurance Co.* 222 N. Y. 178, 186, 118 N. E. at 625, the court said:

> "The tables of mortality are at best only slight evidence of the expectancy of life of any particular person, to be considered in connection with proof of his health, constitution, habits, and mode of living. [citations] Such tables show only the average length of life among the classes whose lives are taken into consideration in preparing the tables. There are several tables which differ quite widely, and it goes without saying that in any given case the habits and manner of living of the individual may be totally different from those of the persons considered in preparing the tables."

In the present case, even in the absence of a consideration of various other hazards undertaken by the assignee, a finding of actual life expectancy of Mrs. Pratt of approximately four years in excess of the figure shown by one of the mortality tables considered by the district court would have conclusively removed the assignments in question from the operation of the New York usury statute.

II.

The Court of Appeals has decided an important state question in a way in conflict with applicable state law.

The district court, with the approval of counsel, agreed that New York law governs the validity of the assignments. In its decision, however, that court misinterpreted New York law to mean that a transaction which appears on its face to be a sale of an interest in property, measured in dollars, and which in fact had been intended by

the parties to be a sale, must be converted by operation of law into a loan if the purchaser does not run any substantial risk of receiving back the amount actually paid to the seller.

The opinion of the court of appeals, affirming the district court, perpetuates this error, and enunciates the principles upon which the decision was based in terms which extend the effect of the case not only to assignments of remainder interests but also to such ordinary transactions as sales and lease-back agreements, and purchases in consumer credit transactions, both of which are in widespread use in the State of New York. Thus, in answer to petitioner's argument that the New York usury statute was not applicable to a transaction that appeared on its face to be a sale, in the absence of a finding that the parties had in fact intended the transaction to be a loan, the court of appeals stated that "In New York, usurious intent is not based upon a finding as to the subjective intention of the parties, but rather on determination as to the effect of the transaction itself" (App. A, p. 25), and that "It is sufficient that a consequence of the transaction is exaction of interest greater than what the law allowed" (App. A, p. 25). To determine the issue of sale or usurious loan, the court of appeals said that "The test is whether the principal is put to any genuine hazard" (App. A, p. 26).

In reaching this erroneous result, the district court and the court of appeals, neither of which had the advantage of being familiar with the intricacies and trends of New York law and practice (cf. *Huddleston* v. *Dwyer* 322 U. S. 232, 237), failed to give effect to the following persuasive data which show that the highest court of the State of New York would have upheld the validity of the assignments:

(a) In the cases upon which the district court and the court of appeals placed reliance, there had been a finding from the facts that the parties actually had intended a loan as opposed to a sale. *Fiedler* v. *Darrin*, 50 N. Y. 437 (1872); *Hall* v. *Eagle Insurance Co.* 136 N. Y. S. 774 aff'd w/o op. 211 N. Y. 507 (1914); *Hartley* v. *Eagle Insurance Co.* 222 N. Y. 178, 118 N. E. 622 (1918); *Brown* v. *Robinson*, 224 N. Y. 301, 120 N. E. 694 (1918). In the *Hartley* case, the New York Court of Appeals expressly limited the effect of the *Hall* case, upon which the courts below relied so heavily, to the actual holding in that case, viz., that an assignment is enforceable as a loan at legal interest where there is an allegation, followed by an actual finding upon credible evidence, that the parties had intended the assignment to serve as security for such a loan. The other case heavily relied upon by the courts below, *Stotesbury* v. *Huber*, 237 Fed. 413 (E. D. N. Y. 1916), was decided on the basis of the opinion in the *Hall* case prior to the limitation placed thereon by the New York Court of Appeals in *Hartley*.

(b) No New York court has ever invalidated an assignment of a defeasibly vested future interest of the type involved in this case, viz., one that was to become possessory at an indeterminable future date, and in four reported cases the New York courts have sustained the validity of assignments of such interests. *Brown* v. *Robinson*, 224 N. Y. 301, 120 N. E. 694; *Estate of Charles Kohler*, N. Y. L. J. 3-4-47 p. 857, aff'd w/o op. 78 N. Y. S. 2d. 380, lv. to app. den. 297 N. Y. 1036, 80 N. E. 2d 458; *In re Smith's Will*, 116 N. Y. S. 2d 57, aff'd 305 N. Y. 764, 113 N. E. 2d 154; *Hunnewell* v. *Sanger*, N. Y. L. J. 8-9-57. In the 42 years since 1918, when the New York Court of Appeals decided *Hartley* and *Brown* v. *Robinson*, 224 N. Y. 301, 120 N. E. 694, nine reported cases of assign-

ments of future interests have been decided by New York courts, and only one assignment has been held invalid, viz., *In re Reif's Will*, 30 N. Y. S. 2d 47 (1941), in which a surrogate declared the assignment of an indefeasibly vested remainder interest invalid, the opinion clearly showing that the true basis for the holding was that there had been an unconscionable bargain with an immature youth.

(c) Assignments such as those involved in the present case are very common in the State of New York, and are frequently passed upon in one form or another as a matter of routine procedure in the New York courts. The legislature even passed a statute to permit recording of such assignments for purposes of notice and determining priority between assignees.

(d) The New York courts recognize that a remainder interest is freely alienable, and they make no distinction in any respect between this form of property and any other form of property. Furthermore, the New York courts have firmly rejected the doctrine, at one time prevalent in England, that a remainderman could rescind the sale of his remainder interest upon a showing that he had not received a consideration determined to be actuarily adequate, coupled with an offer to return the purchase price with interest and costs. *Parmelee* v. *Cameron*, 41 N. Y. 392; *Provident Life & Trust Co.* v. *Fletcher*, 237 Fed. 104, aff'd 258 Fed. 583; *Brown* v. *Fletcher*, 253 Fed. 15. The decision petitioner seeks this Court to review, seriously restricts the alienability of future interests, and reinstates to the fullest extent the previously rejected English doctrine relating to dealings with remaindermen.

(e) The New York usury statute is applicable only to loan transactions. If a New York court has found as a

fact that the parties actually intended a loan as opposed to a sale, it seeks to uphold the loan against a defense of usury by applying either the law of the place of execution (in this case New York, where the maximum interest rate is 6%) or the law of the place of performance (in this case Illinois, where the maximum interest rate is 7%). *Short* v. *Taylor Maide Co.*, 66 N. Y. S. 2d 545; Stumberg, *Conflict of Laws* (1937) 212.

(f) In considering loan transactions, the New York courts recognize that the presence of a bona fide hazard will prevent the application of the New York usury statute. Such hazards exist, for example, if under the terms of the loan the lender is certain of recovering the principal of his loan but is not certain of receiving all or even part of the interest thereon. *Hartley* v. *Eagle Insurance Co.*, 222 N. Y. at 183, 18 N. E. at 624 (1918), or if the assignee might be subjected to the delay and expense of litigation before receiving the benefit of his assignment, *Matter of Fromberg*, 117 N. Y. S. 2d 40, aff'd w/o op. 306 N. Y. 700, 117 N. E. 2d 802 (1954). Both of these hazards existed in the present case, and they were magnified by the presence of the spendthrift clause in the will of the decedent, a clause which respondent claimed made his assignments invalid. Notwithstanding this contention and the holding of the district court that the spendthrift clause did apply to the assignments in question, so that the assignee had no enforceable claim against the trust estate, the court of appeals (which reversed the district court on that point of law) held that the risk of litigation concerning the applicability of the spendthrift clause, as well as various other hazards assumed by the assignee, was merely "colorable" (App. A, p. 29).

Conclusion

The procedure on summary judgment adopted by the district court and sanctioned by the court of appeals in this case, which imposed a compromise upon petitioner against his will and denied him a trial of genuinely controverted issues of material fact, admitted by court and counsel to be present, was such a radical departure from the accepted and usual course of judicial proceedings that this Court should exercise its power of supervision. In conjunction with its exercise of that power, this Court should either correct the erroneous application of state law on the important state question involved or direct one of the courts below to determine such law in a proper manner.

Respectfully submitted,

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APPENDIX A

OPINION BELOW

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1959 JANUARY SESSION, 1960

Nos. 12571, 12572, 12573, 12574

MARGARET DEKORWIN, ETC.,
Plaintiff,

v.

FIRST NATIONAL BANK OF CHICAGO, ETC., *et al.,*
Defendants.

THE FIRST NATIONAL BANK OF CHICAGO, as Trustee under the Will of OTTO YOUNG, Deceased,
Petitioner-Appellee,

v.

GRAVERAET YOUNG KAUFMAN,
Respondent-Appellee,

and

DR. LOUIS RUTTENBERG, *et al.,*
Respondents-Appellants in No. 12572,

and

HENRY N. RAPAPORT, *et al.,*
Respondents-Appellants in No. 12573,

and

KARL C. JACOBS, *et al.,*
Respondents-Appellants in No. 12574.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Appendix A

FEBRUARY 3, 1960

Before DUFFY, KNOCH and CASTLE, *Circuit Judges.*

DUFFY, *Circuit Judge.* Otto Young died November 30, 1906. By his will, he created a trust which was to terminate upon the death of his last surviving daughter, provided his youngest surviving grandchild had attained the age of twenty-one years. Upon termination, the corpus of the trust was to be distributed equally among his grandchildren, with issue of deceased grandchildren representing their parent *per stirpes.* This appeal involves another phase of extensive litigation[1] growing out of the will of Otto Young, deceased.

In 1943, an action was initiated in the United States District Court for the Northern District of Illinois to construe the will of Otto Young. This action culminated in a decision by this Court that, *inter alia,* the grandchildren's future interests were vested subject to divestment. *DeKorwin* v. *First National Bank of Chicago,* 179 F. 2d 347. Following this decision, Graveraet Young Kaufman, whose mother was then the testator's last surviving daughter, began to make various assignments in New York which purported to convey portions of his remainder interest. The last of these assignments was dated August 7, 1956. Kaufman's mother died on August 17, 1956.

On September 4, 1956, The First National Bank of Chicago, as Trustee of the estate of Otto Young, petitioned the District Court for instructions. It alleged, among other things, that it had notice of the assignments made by Kaufman and sought the aid of the Court in

1. Various aspects of this litigation have been before this Court in *DeKorwin* v. *First National Bank of Chicago* (1946), 156 F. 2d 858; *DeKorwin* v. *First National Bank of Chicago* (1950), 179 F. 2d 347; *DeKorwin* v. *First National Bank of Chicago* (1956), 235 F. 2d 156, and *DeKorwin* v. *First National Bank of Chicago* (1959), 267 F. 2d 337.

determining to whom it should pay Kaufman's share of the corpus of the trust.[2] In his answer to the Trustee's petition, Kaufman alleged that the remainder interest was not assignable by virtue of the spendthrift clause of the will of Otto Young, and also that the assignments were void as they were loan transactions which violated the usury statutes of the State of New York.

On October 14, 1957, Henry N. Rapaport filed a motion for summary judgment directing the Trustee to pay him in excess of $247,000 of Kaufman's remainder interest. As to a portion of this amount, Rapaport is acting as attorney to collect for the estate of Gustave Rubner, deceased. Rapaport was subsequently joined by five other parties who seek to recover various sums from Kaufman's remainder interest. All of these parties, who are appellants in Appeal No. 12573, are sub-assignees of parts of five assignments which originally were made by Kaufman to one Philip Rosen.

In answer to this motion, Kaufman again alleged the assignments were void as being violative of the spendthrift clause in Young's will, and that they violated the usury statutes of the State of New York where they were executed. In addition, Kaufman filed a motion for summary judgment against the various claimants.

On November 12, 1958, the District Court filed a "Memorandum of Decision". This is a lengthy document consisting of forty-two pages of the printed record. It covered a number of points that had been litigated. The Court held, *inter alia*: 1) the spendthrift clause of the will applied to corpus; 2) the assignments could not be enforced against the Trustee, hence claimants' motion for a summary judgment was denied; 3) there was a statement

2. On March 30, 1959, this Court held that the District Court had jurisdiction to supervise the termination and liquidation of said trust, 267 F. 2d 337

in the decision that claimants could bring an action against Kaufman if their assignments were valid; 4) that a determination of the issue of usury would require a trial to determine various issues of fact, but that such a trial was unnecessary as the assignments constituted valid, enforceable loans at an implied interest rate of six percent. The Court then ordered an accounting to determine the amount actually paid to Kaufman for the assignments as well as proper out-of-pocket expenses of the assignees.

From this order the claimants (in Appeal No. 12573) appealed, claiming 1) the spendthrift clause of the will does not apply to corpus; 2) the assignments were valid sales of future interests and the usury laws are not applicable to them; and 3) Kaufman is estopped to challenge the validity of the assignments. The claimants in Appeals Nos. 12572 and 12574 also have appealed from this order. They do not claim under the five assignments here at issue, but do claim under other assignments made by Kaufman, and contend that any decision on the issues raised in the instant appeal will materially affect their rights. Appellants in Appeal No. 12571 contend their rights should not be affected by our decision in Appeal No. 12573, and request that we so state. The appellants in Appeal No. 12571 claim under other assignments made by Kaufman and other grandchildren of Otto Young.

Kaufman was a man experienced in matters of finance and loans. From 1921 to 1932, he was associated with one of the large banks in New York City. His early experiences were with the discount, collateral loans and credit departments. By 1926, he was an assistant vice president where his duties included the analysis of loans. From 1928 to 1932, he was a first vice president of the bank and received an annual salary as high as $34,000. He was in

charge of the bank's largest branch office, and served on the discount committee which met weekly to discuss loans and other banking matters. He later became associated with several brokerage houses, and in 1946 became associated with a bank where he was employed until 1951.

Kaufman made his first assignment on September 25, 1950. At that time he was fifty years old. From 1947 through the middle of 1950, he received at least $1,000 a month from his mother. From 1946 through 1951, he earned a salary of $3,000 per year plus an expense account of from $1,200 to $2,400 per year.

Prior to making his first assignment of a portion of his remainder interest, Kaufman attempted to borrow on that interest by offering it as security. He was unable to arrange such loans. In 1950, Kaufman negotiated with Rosen for the sale of part of his remainder interest. In these negotiations it was suggested that insurance on Kaufman's life was essential to protect the assignees in the event he predeceased his mother, in which case Kaufman's remainder interest would terminate. However, it was never suggested that Kaufman pay for such insurance and, in fact, he never did pay any premiums.

The assignments in issue were made in April, July, November and December of 1951, and in April of 1952. In these assignments Kaufman purported to grant, bargain, sell, assign, transfer, and set over to Rosen all of his right, title and interest to the corpus of the trust to the extent of $62,500, $42,000, $42,000, $87,500 and $87,500, respectively. The amounts paid to Kaufman were $15,000, $10,075, $10,000, $20,000 and $20,000 respectively. Thus, by the five assignments, Kaufman purportedly sold an interest of $321,500 of his remainder for $75,075. Contemporaneously with the assignments, Kaufman executed affidavits which

recited that the assignments were made of his own free will, and that in his opinion the consideration was fair and adequate. At the time of the sub-assignments to Rapaport, Kaufman executed an estoppel certificate stating that the assignments were valid and subsisting, that he had no defenses, offsets, or counterclaims thereto, that he had sold the portions of his interest, and that he agreed to the sale. At the time of the various assignments, Rosen took out insurance on Kaufman's life. The total coverage amounted to $159,000. This amount was determined by Rosen. All premiums on such insurance were paid by Rosen or the sub-assignees.

Concerning the holding by the District Court that the spendthrift clause of the will applied to corpus, appellants contend Judge Igoe's earlier decision to the contrary is *res judicata*. In his earlier opinion, Judge Igoe stated (84 F. Supp. 918, 929-930): "The leaning upon the spendthrift trust clause by counsel for the bank, in this connection, affords no support for its position. The testator when inserting this clause in the income gifts was concerned only with protection of the income beneficiaries against creditors. And if, as the bank contends, the testator had a different purpose in mind, the absence of a spend-thrift clause from the gifts of corpus is not without significance as supporting the plaintiff's position."

In the argument in the District Court prior to the first decision, Attorney Aiken, who now represents Kaufman but who did not represent him in the earlier proceeding, asked: "How can anyone say that provision expressly made for the 'comfortable support and maintenance of my daughters and their issue,' can be carried over to ultimate division of the corpus?"

Appendix A

In the action to determine whether the remainder interests of the grandchildren were vested or contingent, the argument was made that such remainders could not be vested because of the spendthrift clause. In 179 F. 2d 347, we affirmed the holding of the District Court that the remainders were vested, but we did not comment upon the applicability of the spendthrift clause to corpus. Kaufman did not assign any of his remainder interest until after the decision of this Court just mentioned.

In our view, Judge Igoe was correct in his first decision in 1949. We hold the spendthrift clause in the Otto Young[3] will does not apply to corpus. When the testator referred to the provision in the will which he was making for the "comfortable support and maintenance of my daughters and their issue", he was referring to income and not to corpus.

We think the use of the terms "annuities" and "payments" in the spendthrift clause indicates that it applies only to income. Throughout the will, the term "annuity" is used by the testator to refer to a periodic payment of a sum of money. The term "payment" is used fifty-nine times in the will, and always refers to the payment of income. The bulk of the corpus of the estate was real estate. In providing for the distribution of corpus, the testator used the term "divided" indicating thereby a distribution in kind and not a payment of money.

The construction we have reached is supported by the case of *LaSalle National Bank* v. *MacDonald*, 2 Ill. 2d 581, 119 N.E. 2d 266 (1954). The Court was there called upon

3 The spendthrift clause provides: "The annuities given and the payments directed to be made by this will to my daughters and their issue are intended to provide for the comfortable support and maintenance of my daughters and their issue, and shall be paid over into the hands of said beneficiaries respectively, in person, and not upon any written or verbal order nor upon any assignment or transfer thereof by said beneficiaries, or by operation of law"

to determine whether a spendthrift clause applied to corpus so as to preclude the Trustee from distributing the share of an incompetent to her Conservator. The clause in question provided: "I further direct that the payments to all beneficiaries of my estate be made to such beneficiaries in person or upon their personal receipt, and that no interest of any beneficiary be assignable in anticipation of payment or be liable in any way for such beneficiaries' debts."

The Court held at 119 N.E. 2d, 269: "Paragraph 7 relates solely to the 'payment' of income from the trust. At the opening words of the next paragraph, 'I further direct that the payments' also seem to relate most naturally to payments of income. Use of the plural 'payments' in paragraph 8 does not, we think, indicate an intention to include principal as well as income. The testator consistently distinguished between the 'payment' of income and the 'distribution' of principal."

In *Potter* v. *Couch*, 141 U. S. 296 (1891), the Supreme Court held that forfeiture restraint on the alienation of an equitable fee in Illinois lands was void. This Court, in *Danning* v. *Lederer*, 232 F. 2d 610, 612, 613, pointed out that the *Potter* case had no bearing on the point we were then considering "* * * because it (Potter) was decided in 1891, before spendthrift clauses had been accepted as a valid restraint on the alienation of an equitable interest in the corpus of a trust in Illinois."

The conclusion we reach that the spendthrift clause did not apply to corpus is not conclusive in the determination of the issues before us. True, it was one of the reasons for the decision of the trial court, but we think the decision of that court can be sustained on another ground.

Appendix A

Appellants argue that the New York usury statutes apply only to loans and not to sales. They urge that whether a certain transaction is a loan or a sale must be determined by ascertaining the intention of the parties. In the case at bar, they point to the wording of the assignments, the affidavits executed in connection with the assignments and Kaufman's testimony. They also contend that the matter of insurance taken out on Kaufman's life by the assignee is irrelevant.

Ascertainment of the New York law on the question before us poses a difficult problem. Language in some of the New York decisions seems to be directly in conflict with language in other decisions dealing with the same problem. However, we must determine as best we can, the applicable New York law.

The trial court held, 170 F. Supp. 112, 128: "In New York, usurious intent is not based upon a finding as to the subjective intention of the parties, but rather on determination as to the effect of the transaction itself. The intent which will violate the statute is a general one, not a specific intent. A transaction may constitute usury even though the parties did not specifically intend to provide for usurious interest. It is sufficient that a consequence of the transaction is exaction of interest greater than what the law allowed."

The trial court continued: "Where the difference between the amount paid the remainderman plus the maximum legal rate of interest is only 'somewhat' less than the amount to be paid the assignee, the court should determine the specific or particular intention of the parties. *Fiedler* v. *Darrin*, 50 N. Y. 437; *Hartley* v. *Eagle Insurance Co.*, 222 N. Y. 178; *Brown* v. *Robinson*, 224 N. Y. 301. But the court is not to inquire as to specific intent where

'the interest payable [is] so large that, in view of all the circumstances, an intent to provide for the payment of interest beyond the legal rate will necessarily be imputed to them. (*Fiedler* v. *Darrin*, 50 N. Y. 437).' *Hartley* v. *Eagle Insurance Co.*, 222 N. Y. 178, 187."

New York courts have considered a number of so-called sales of remainder interests, some at prices far below their value determined actuarily. In most of such cases the word "loan" was not mentioned, and the transaction was in the form of a sale. Nevertheless, the New York courts concluded that many such transactions were loans.

Other New York cases have not first decided whether the transaction was a sale or a loan but have made a single determination of the issue or sale or usurious loan. The test was stated by Judge Learned Hand in *Provident Life and Trust Company* v. *Fletcher*, 237 Fed. 104, 108-109 (affirmed 258 Fed. 583, CA 2), where it was stated: "* * * the first question of law which arises is whether the transaction, without the security of any life insurance policies, was usurious. * * * The general test is whether the principal is put at any genuine hazard. * * *" After citing numerous New York cases, Judge Hand in the opinion, continued: "In all these cases, either in one way or another, the payment of principal was secured beyond any but colorable hazard. Now it is quite clear that in the case at bar the parties started out, as I have said, upon a usurious transaction, and if Braker had been able to secure a policy of life insurance nothing could be said for its validity, because the principal would have been secured under all contingencies. But he was unable to get any insurance policy, and the necessary result, whatever the original purpose, was to imperil the principal, not upon a mere colorable hazard, but upon a genuine one."

Where a remainder is vested but subject to divestment, as in the case at bar, then the presence of insurance under New York law does affect the transactions. *Brown* v. *Fletcher*, 244 Fed. 854, 859. In the *Brown* case the court of appeals for the Second Circuit was impressed by the presence of insurance, while the absence of insurance was perhaps decisive in Judge Hand's decision in the *Provident Life* case hereinbefore referred to.

Although a personal obligation to repay the amount advanced is not essential under New York law to create a loan, nonetheless the New York courts have emphasized provisions in assignments which impose some personal obligation upon the assignor. In the case at bar Kaufman agreed "that if the sum of Forty-two Thousand Dollars ($42,000) herein assigned to Philip S. Rosen is paid to me by operation of law or by reason of the trustee's failure or refusal to pay the said sum directly to Philip S. Rosen • • • or if for any reason whatsoever the said sum shall come into my hands, then and in such case, I shall hold the same in trust for the benefit of Philip S. Rosen, and forthwith pay the same sum over to him without further demand or direction."[4] This provision would seem to impose a personal obligation on Kaufman, in the event the assignee fails to make collection directly out of the trust estate, that he will pay from funds which came into his hands from the trustee. The trial court held that Kaufman could be required to hold for the benefit of his assignees such sums as he received from the trustee. We think this was a correct interpretation of New York law.

Briefs submitted by Rapaport *et al.*, and by Jones, *et al.*, in Appeal No. 12753, seem to admit that at an earlier

[4] All assignments here under consideration used substantially the same language.

date New York courts would have regarded the Kaufman assignments void for usury, but contend that later New York decisions have changed that view. Appellants rely heavily on *Hartley* v. *Eagle Insurance Co.*, 222 N. Y. 178, 118 N.E. 622 (1918) and *Brown* v. *Robinson*, 224 N. Y. 301, 120 N.E. 694 (1918). The appellants contend *Hall* v. *Eagle Insurance Company*, 136 N. Y. Supp. 774 (1912) no longer is the law of New York, and that in all cases there must be a finding that the parties had a specific intent to evade the usury statute.

There is no language in either Hartley or Brown repudiating the *Hall* case or any other prior decision of New York courts in which assignments of remainder interests were held to be usurious or were treated as equitable mortgages. We think the specific reference to *Fiedler* v. *Darrin*, 50 N. Y. 437 (1872) is significant.

In *Hartley*, the court said, 222 N. Y. 187, 118 N.E. 625: "So here the question is: Did the parties intend to evade the usury statutes of the state, or was the interest payable so large that, in view of all the circumstances, an intent to provide for the payment of interest beyond the legal rate will necessarily be imputed to them?" In *Hartley*, the court regarded the amount which the assignor was obliged to pay as only slightly in excess of legal interest.

Hartley was followed by *Brown* v. *Robinson*, 224 N. Y. 301, 120 N.E. 694. In that case the court regarded the amount involved as exceeding legal interest by a "comparatively small amount." The key to the *Hartley* and *Brown* decisions lies in those facts which led the New York Court of Appeals to use the words "somewhat in excess" and "comparatively small amount". In the case at bar where Kaufman received only 23% of the face amount of the assignment, the assignee was to receive such a large

gain over the amount he paid that, under New York decisions, a usurious intent must be imputed to the parties.

In *Fiedler* v. *Darrin*, cited by the court in *Hartley*, the court held that the parties could not avoid the consequences of their act by testifying that they did not intend usury, the court stating that the parties could not give the transaction a different name from that which the law gives it, or designate the transaction as a purchase and sale when the law calls it a loan of money secured by mortgage.

The only real risk which faced the assignee Rosen was that Kaufman might die before his mother and leave issue surviving. But this risk was eliminated by the insurance taken out on Kaufman's life. As to the five assignments here at issue, the amount of the insurance was calculated to be approximately equal to the sums advanced, plus interest, plus the cost of insurance for the anticipated life expectancy of Kaufman's mother. The other so-called risks mentioned in the briefs of appellants are merely colorable.

In determining that the transactions involved in the case at bar should be treated as loans at legal interest, and that the assignments were in the nature of equitable mortgages, the trial court was following a course marked out by various decisions of New York courts. These courts have many times shown a reluctance to enforce the New York usury statutes to the full. Although disapproving such assignments, they have been unwilling to decree forfeiture of both principal and interest. Instead, they have entered judgments for assignors, finding the transactions void and unenforceable, but such decrees were conditioned upon the assignor paying to the assignee the amount he received, plus interest and plus the costs of making the loan including insurance premiums and the interest thereon.

Heise v. *Selected Securities Company*, 105 N. Y. Supp. 1079, 1082 (1907); and *Leavitt* v. *Enos*, 140 N. Y. Supp. 862, 864 (App. Div. 1913). In spite of a finding of usury, New York courts fashioned what seemed to them to be an equitable result requiring the assignor to pay the amount he had received, plus interest and costs. In other instances, the same result was reached after considering but not determining the question of usury. *Hall* v. *Eagle Insurance Company*, 136 N. Y. Supp. 774 (App. Div. 1912) is perhaps the leading case of this kind in New York. The same result was achieved in the later case of *Stotesbury* v. *Huber*, 237 Fed. 413 (E.D. N.Y. 1916). A more recent decision refusing to enforce assignments at full value is *In Re Reif's Will*, 30 N. Y. S. 2d 47 (1941).

We hold that under New York law as announced by various court decisions, the District Court was justified in fashioning the equitable remedy announced in the decree and judgment appealed from herein. In many respects, the judgment was patterned after the decisions in *Hall* v. *Eagle Insurance Company*, *supra*, and *Stotesbury* v. *Huber*, *supra*.

Rapaport strongly urges that Kaufman is estopped from asserting usury against him because of the so-called estoppel certificate. There seems to be no dispute as to the background of this document or of Rapaport's knowledge of the pertinent facts at the time it was executed.

Rapaport was a New York attorney. In November, 1954, he secured an option from Eliot Hyman to acquire at forty cents on the dollar up to $250,000 of the interest Hyman had received from Rosen. Rapaport examined the duplicate originals of the five assignments from Kaufman to Rosen, and the affidavits executed by Kaufman in connection therewith. He was informed as to the amounts

paid to Kaufman for each assignment, the details of the insurance taken out on Kaufman's life and other pertinent information. As Rapaport had full information as to all the details of the transaction, it is difficult to understand the contention that he relied on the affidavit which Rapaport prepared for Kaufman to sign, and which contained largely conclusions of law. We hold Kaufman was not estopped. *Gaylord* v. *Commissioner of Internal Revenue*, 9 Cir., 153 F. 2d 408, 416; *City of Chicago* v. *Joseph*, 7 Cir., 95 F. 2d 444, 446.

In the appeal of Arthur N. Pierson, *et al.*, Appeal No. 12571, counsel make an unusual demand. They insist that this Court, in this opinion, should expressly state that the decision herein is without effect upon any and all rights of those assignees who are appellants in Appeal No. 12571.

The appellants in Appeal No. 12571, as is the case of appellants in Appeals Nos. 12572 and 12574, claim under assignments of Kaufman other than the five assignments which have been considered herein. We decline to render an advisory opinion of what, if any, effect our decision in the case at bar may have on litigation concerning assignments executed on other occasions and under other circumstances.

The judgment of the District Court dated November 12, 1958, is

AFFIRMED

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT BELOW

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, February 3, 1960

Before

Hon. F. RYAN DUFFY, Circuit Judge
Hon. WIN G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge

MARGARET DEKORWIN, ETC., *Plaintiff*

v.

FIRST NATIONAL BANK OF CHICAGO, ETC., *et al.*,

Defendants.

FIRST NATIONAL BANK OF CHICAGO, AS TRUSTEE, ETC., PETITIONER,

v.

No.

GRAVERAET YOUNG KAUFMAN, ET AL.,

Respondents.

No. 12571 Appeal of ARTHUR N. PIERSON, JR., *et al.*,
No. 12572 Appeal of DR. LOUIS RUTTENBERG, *et al.*,
No. 12573 Appeal of HENRY N. RAPAPORT, *et al.*,
No. 12574 Appeal of KARL C. JACOBS, *et al.*,

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Appendix B

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court dated November 12, 1958, in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX C

ORDER DENYING REHEARING

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, April 11, 1960

Before

Hon. F. RYAN DUFFY, Circuit Judge
Hon. WM G. KNOCH, Circuit Judge
Hon. LATHAM CASTLE, Circuit Judge

MARGARET DEKORWIN, ETC., *Plaintiff*

v.

FIRST NATIONAL BANK OF CHICAGO, ETC., *et al.*,

Defendants.

FIRST NATIONAL BANK OF CHICAGO, AS TRUSTEE, ETC., PETITIONER,

v.

No. 12573

IRAVERAET YOUNG KAUFMAN, ET AL.,

Respondents.

Appeal of HENRY N. RAPAPORT, *et al.*,

Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petitions for rehearing of this cause be, and the same are hereby, DENIED.

APPENDIX D

STATUTES INVOLVED

New York General Business Law §373

"All bonds, bills, notes, assurances, conveyances; all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forebearance of any money, goods or things in action, than is above prescribed [6% per annum], shall be void."

"Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt, has been taken or received in violation of the foregoing provisions, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and cancelled."

Illinois Annotated Statutes, Ch. 74, §6

"If any person or corporation in this State shall contract to receive * * * a greater rate of interest or discount than 7% upon any contract, verbal or written, such person or corporation shall forfeit the whole of the interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation * * *".